78-1431

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No.

JOHNSON OIL COMPANY, INC.	:	PETITION FOR WRIT OF CERTIORARI TO THE
Petitioner	:	UNITED STATES COURT OF APPEALS FOR THE
vs.	:	TENTH CIRCUIT
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Respondent.	:	

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vs.	:	
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Respondent.	:	

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Johnson Oil Company, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on November 22, 1978.

OPINIONS BELOW

The November 22, 1978 opinion of the Court of Appeals of the Tenth Circuit, whose judgment is herein sought to be reviewed, is reported at 586 F.2d 1375 and is reprinted in a separate appendix to this petition, pp. 29-65. The prior opinions of the United States District Court for the District of Utah, Northern Division, also reprinted in the appendix at pp. 66-97, were not reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 22nd, 1978. On December 20, 1978 the Petitions for Rehearing filed by the appellant and appellee were denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented by this Petition is whether on appeal a claim for punitive damages, arising in conjunction with a common law tort claim and a common law contract claim as well as a claim of breach of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751, gives the Tenth Circuit Court of Appeals jurisdiction to decide the punitive damages claim, or whether, by reason of some of the other claims of the appeal being founded in EPAA and other Federal price freeze legislation, the entire appeal, including the punitive damages claim, must be heard by the Temporary Emergency Court of Appeals (TECA) and, if so, whether the Tenth Circuit can transfer jurisdiction of the appeal or any part thereof to TECA.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Emergency Stabilization Act of 1970 (ESA) 12 U.S.C. § 1904, Note. Section 211(b)(2) of that Act provides:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

Section 754(a)(1) of EPAA incorporates by reference §§ 205 - 211 of ESA as its enforcement provisions.

STATEMENT OF THE CASE

On June 28, 1974 respondent herein, Mountain Fuel Supply Company, brought a complaint against petitioner and Reland Johnson, petitioner's president and principal stockholder. The complaint was

filed in the state district court of Davis County, Utah. Respondent claimed in that action that petitioner owed monies for deliveries of oil made between November 1973 and April 1974. Petitioner filed an answer and counterclaim and petitioned for removal to the Federal Court on January 6, 1975, which put the case before the United States District Court for the District of Utah, Northern Division.

Petitioner Johnson Oil made essentially five claims in its counterclaim, namely: (1) respondent had tortiously interferred with the business relationship between petitioner and Allied Chemical Company; (2) respondent had terminated its supply of crude oil to petitioner in breach of the terms of the written contract between the parties and also in violation of the freeze order requirements of EPAA; (3) respondent billed petitioner

during the period of November 1973 to April 1974 at improper prices for the crude oil delivered, based on an inflated "posted" price as well as based on "new" and "released" oil prices, as those terms are defined in EPAA regulations, whereas petitioner should have been billed only at "old" oil prices, as defined in the Act; (4) petitioner claimed entitlement to civil penalties, treble damages, and attorney's fees as specified in ESA because of the respondent's violations of EPAA and its regulations; (5) petitioner claimed entitlement to punitive damages because of respondent's malicious and willful conduct in interfering with petitioner's business relationship with Allied and in terminating the oil supply relationship between the parties.

On May 28, 1976, the District Court ruled that respondent Mountain Fuel was

entitled to charge petitioner at "old" and "released" oil rates but not on the basis of "new" oil. It further found that the price set by respondent as the "posted" price was 44 cents per barrel too high. Based on that ruling, petitioner stipulated to the payment to respondent of $19,629.50, which essentially was payment for the "released" oil price differential not previously paid by petitioner for quantities of oil delivered during the time in question. The parties also stipulated that the issues of treble damages, civil penalties, and attorney's fees were reserved for determination after the trial.

The case went before the jury on June 21, 1976 on three issues: (1) intentional interference with a business relationship; (2) breach of contract and violation of EPAA freeze regulations for non-delivery

of oil; (3) punitive damages. At the conclusion of the trial the jury awarded $65,000 as compensatory damages and $110,000 as punitive damages, without specifying whether either the compensatory or the punitive damages were for the tort claim or the breach of the supply relationship.

Subsequent to the jury trial the District Court ruled that petitioner was not entitled to treble damages, attorney's fees, and civil penalties. The Court further ruled that the award of $110,000 punitive damages was to be deleted from the jury award, leaving only the compensatory damages in the amount of $65,000. All of the rulings of the Court, including the May 28, 1976 ruling, the jury verdict, and the post jury rulings, were combined in an order and judgment of the District Court dated May 2, 1977.

Both petitioner and respondent filed appeals with the United States Court of Appeals for the Tenth Circuit. The principal thrust of petitioner's appeal was that the jury award of punitive damages should not have been deleted. Petitioner also argued that it was entitled to attorney's fees, trebel damages on overcharges and civil penalties pursuant to ESA, and that the "posted" price as set by the District Court was still three cents too high.

The respondent's appeal to the Tenth Circuit was based in large part on the May 28, 1976 ruling of the Court as to the definition of "posted" price and as to the elimination of "new" oil being charged to petitioner. Respondent also objected to certain evidence and exhibits presented to the jury on the question of intentional interference. Respondent further argued

that it was improper for the purposes of a jury verdict for the Court not to have separated the breach of supply relationship claim and the intentional interference claim.

On November 22, 1978, the Tenth Circuit ruled that it did not have jurisdiction as to any aspect of the case. It stated that the provisions of § 211(b)(2) of ESA, providing TECA with exclusive jurisdiction of all appeals of district court cases or controversies arising under ESA and EPAA, covered this case.

Both petitioner and respondent filed Petitions for Rehearing, asking the Tenth Circuit to take at least certain portions of the appeal. For the purposes of the Petition for Rehearing, petitioner dropped all claims except for the request to reinstate punitive damages.

It was argued that argued that TECA will not take jurisdiction of any portion of an appeal not specifically part of or directly arising from the Federal laws it is to interpret. Therefore, the refusal of the Tenth Circuit to take any part of the case denied the parties the right of appellate court review on the non-TECA matters.

On December 20, 1978, both Petitions for Rehearing were denied by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN TECA AND THE TENTH CIRCUIT

TECA's position is that its jurisdictional grant excludes anything which does not specifically arise under the Federal legislation it has been called

upon to interpret. On the other hand, the position taken by the Tenth Circuit in this case is that if any part of a case involves questions arising under TECA administered Federal statutes, it will not entertain the case. Therefore, despite the provisions of 28 U.S.C. §§ 1291, 1294 establishing the right of appeal, petitioner is without remedy or right of appeal as to those issues in its appeal which do not arise specifically under TECA administered Federal law. The result which has occurred in this case surely was not envisioned by Congress in its passage of ESA and the creation of TECA.

Shortly after it was created, TECA issued two decisions which basically set the guidelines for its subsequent determinations on the limits of its jurisdiction. In United States v. Cooper, 482 F.2d 1393 (TECA 1973), the Ninth Circuit Court of

Appeals, determining that it had no jurisdiction in the case, transferred the entire matter over to TECA. As the case itself demonstrates, there were no clear guidelines at the time as to what cases should be appealed to a Circuit Court and what cases should be appealed to TECA. Therefore the Ninth Circuit tried to preserve the case for determination by TECA since it found it had no jurisdiction itself over the case.

The ruling in Cooper by TECA is important from two standpoints. First, TECA determined that it could not take jurisdiction of a case via a transfer from another circuit court. The appeal had to be filed within the normal appeal period directly from the district court to TECA. This meant that all of those issues in the case which should have been appealed to TECA were dismissed because the appeal

period had run. Second, TECA determined that the case was severable and that there were several parts of the appeal which should have been retained by the Ninth Circuit, despite the fact that the Ninth Circuit did not take cognizance of the same. Therefore, as to the non-TECA issues, TECA declared itself without jurisdiction and ruled that the matter had in reality never left the Ninth Circuit.

The Cooper case demonstrates the narrow view TECA takes of its own jurisdiction. This narrow view was more clearly explained in subsequent cases issued by TECA. In the case of Associated Gen. Con., Okl. Div. v. Laborers Int. U., Loc. 612, 489 F.2d 749 (TECA 1973) the court accepted an appeal which had been made directly to it from the district court but refused to review certain portions of the case because it felt it

had to limit its attention "to questions arising under the Economic Stabilization Act of which we had jurisdiction." Id. at 750.

In the case of Spinetti v. Atlantic Richfield Co., 522 F.2d 1401 (TECA 1975), the court held that certain counts of the complaint were not reviewable by TECA

> since such claims are not controversies arising under any title of the Economic Stabilization Act or the Allocation Act or under regulations or orders issued thereunder. The antitrust, Fair Trade, and contractual claims are appealable only to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291.
>
> Id. at 1403 (Emphasis added).

TECA then cited both Associated General Contractors and Cooper as authority for its decision.

Subsequently, in Long View Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977), the court in a footnote said:

As we indicated in Spinetti v.

> Atlantic Richfield Company, 522 F.2d 1401, 1403, (Em. Ap. 1975), this court does not have jurisdiction over claims such as the anti-trust and contractual claims made in the plaintiff's complaint.
>
> Id. at 1009.

The citation of the above cases shows the definite course set by TECA for itself in excluding on jurisdictional grounds any aspect of a case which does not specifically have its roots in EPAA or ESA. On the other hand, it is just as clear from the instant case that the United States Court of Appeals for the Tenth Circuit will refuse to take any part of a case if the appeal contains any ESA or EPAA claims.

In the instant appeal a demand for the reinstatement of punitive damages, a common law remedy, has been made. That in turn has its origins in this case in the common law tort of interference with a

business relationship as well as in the claim of contractual breach. Since the punitive damages issue would clearly not be reviewable by TECA under its guidelines of jurisdiction, the Tenth Circuit should have at least taken that much of the appeal. The Tenth Circuit's decision not to do so leaves parties in general and petitioner in particular without an appeal right on non-EPAA or ESA claims solely for the reason that one or more such non-EPAA or ESA points on appeal have been joined with EPAA or ESA claims.

It is obvious that Congress in creating TECA did not envision it was thereby creating a number of non-appealable claims which are characterized only by reason of their being associated with TECA related claims when before the district court. In reality the jurisdiction of TECA has been carved out

of that which has been granted to the Circuit Courts. All non-TECA claims still belong to the Circuit Courts, regardless of how many TECA claims with which they may be associated at the time of trial, if it doest not take a resolution of the TECA claims to determine the non-TECA ones. Cf., Citronelle - Mobile Gathering, Inc. v. Gulf Oil Corp., CCH Federal Energy Guidelines, Paragraph 26,125 (TECA 1979); M.-Spiegel & Sons Oil Corp. v. B.P. Oil Corp., 531 F.2d 669 (2nd Cir. 1976).

This Supreme Court, on facts not unlike the instant case, remanded a case to the Tenth Circuit after the Tenth Circuit had earlier ruled that the case was solely within the jurisdiction of TECA. Bray v. United States, 423 U.S. 73 (1975). In that case, the IRS issued a subpoena to petitioner Bray, directing him to produce some records in connection with

alleged violations of ESA. Because of failure to comply with the subpoena, petitioner was convicted of criminal contempt. On appeal, the Tenth Circuit held that it had no jurisdiction because of the exclusive jurisdiction provision of § 211(b)(2) of ESA. This Court ruled that a contempt charge did not come under the umbrella of ESA and a review of the same by TECA

> is not necessary to assure uniform interpretation of the substentive provisions for the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.
>
> Id. at 75.

This Court further ruled in Bray that even though the contempt charge was filed

> in connection with an investigation of Stabilization Act violations, it was not dependent on the existence of such violations

or even the continuation of the investigation.

Id. at 76.

In its substance, this case presents exactly the same question as Bray, namely whether in a case having claims of EPAA violations, an issue which does not directly arise under any provision of EPAA or ESA can only be reviewed by TECA. The difference in this case, as opposed to Bray, is that admittedly there are some parts of this appeal which, upon close investigation, are matters for TECA. These issues include the definition of "posted" prices and the claims for treble damages, civil penalties, and attorney's fees. In Bray there was only one issue on appeal. Otherwise, the two cases are parallel. It does not require a determination of any EPAA provisions in order to resolve the question whether the punitive damages should be reinstated.

Hence, the guidelines set up by Bray should not be any different simply because of that one difference between the two cases.

It is important that there be reviewability of all aspects of a case. The present decision of the Tenth Circuit does not permit such reviewability of a district court opinion, in violation of the structure of the Federal judiciary system and 28 U.S.C. §§ 1291, 1294. The granting of the Writ would not only be in the interest of the merits of this specific case, but also would give relief in other future cases which surely will arise under similar facts.

As noted herein, petitioner's principal reason for the appeal to the Tenth Circuit was to seek reinstatement of the punitive damages it was originally awarded by the jury. Over three fourths

of its brief was devoted to that one subject. The question was the sufficiency of the evidence to permit the jury to determine as they did. The interpretation of law and fact on that point has not even the slightest foundation or basis in ESA or EPAA. It is a matter totally and solely within the capacity and jurisdiction of the Tenth Circuit to decide.

Because the Tenth Circuit has treated the instant case in its entirety as being within TECA's jurisdiction, and since it is clear that TECA would not have taken the punitive damages issue of the case had it been appealed to TECA, and in light of the mandate of Congress that TECA should not take any portion of a case except those parts which are specifically within TECA's province, this Court should grant a

Writ of Certiorari to the Tenth Circuit to review this case.

POINT II

THIS COURT SHOULD PROVIDE A TRANSFER OF CASES FROM CIRCUIT COURTS TO TECA ON MATTERS THAT ARE SOLELY WITHIN THE JURISDICTION OF TECA

The Cooper case emphasizes the situation which needs to be corrected by this Court. Not since the days of the old English writs has a party been put to more of a guessing game than now in trying to determine the jurisdiction of the Circuit Courts and TECA in matters relating to EPAA and ESA. Based on the decision of the Tenth Circuit Court of Appeal in the instant case and the TECA cases cited herein, a party who has to guess whether to appeal a District Court decision to TECA or to the Circuit Court, is automatically out of court with no recourse if he guesses incorrectly.

In Cooper, the Ninth Circuit attempted to transfer the case over to TECA, which refused jurisdiction. In Associated General Contractors the appellant guessed correctly on some of the issues but incorrectly as to some of the others. As to the incorrect guesswork the right to appeal was totally lost. This guesswork should be eliminated. More importantly, an appellant should not be put to the burden of guessing at his peril.

TECA is undoubtedly correct in its view of its limited jurisdiction. Its purpose is not to review those matters which would normally go to a Circuit Court. Its purpose is only to determine matters for which it has been specially created and for which it has a special expertise and background. Nor, as this

Court said in Bray, should TECA be burdened with matters just as easily resolved by the Circuit Courts.

It is respectfully submitted that in case of doubt, a party should be able to present his appeal to the appropriate Circuit Court and then have that Court determine which matters fall within its jurisdiction. The Circuit Court should then be able to refer the rest of the matters over to TECA for jurisdiction. If necessary for jurisdictional purposes, TECA could then refer some parts of the case back.

Without the above procedure, a party is forced to appeal all aspects of his entire case to both TECA and to a Circuit Court and to present two parallel briefs to both courts. Even then one of the courts may determine it has no jurisdiction over a matter, only to have the other

court also declares itself without jurisdiction over the identically same matter.

The conflict between TECA and the Circuit Courts must be resolved in order that the appellate system of the Federal judicial system can work properly. A resolution is also necessary for the proper economy of TECA.

It is therefore respectfully requested that this Court grant a Writ of Certiorari to the Tenth Circuit for a determination as to which issues in this case are within the jurisdiction of the Tenth Circuit. In particular this Court should grant the writ in order to direct the Tenth Circuit to accept and determine the issue of punitive damages. There should also be a further determination that those issues which are not within the Tenth Circuit jurisdiction be transferred

over to TECA. Since petitioner's appeal was timely filed with the Tenth Circuit, TECA should then be directed to take jursidiction of the same as though originally filed with TECA.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 77-1410 and 77-1432

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff, Appellee and Cross-Appellant,	)	Appeal from the United States District Court for
vs.	)	the District of Utah
RELAND JOHNSON,	)	(D.C. No. NC-75-3)
Defendant,	)	
and	)	
JOHNSON OIL COMPANY, INC.,	)	
Defendant-Appellant and Cross-Appellee.	)	

Submitted: September 29, 1978

586 F.2d 1375

Robert S. Campbell, Jr. (Duane R. Smith on the brief) of Watkiss and Campbell, Salt Lake City, Utah, for Appellee-Cross Appellant Mountain Fuel.

Dan S. Bushnell (Joseph C. Rust on the brief) of Kirton, McConkie, Boyer and Boyle, Salt Lake City, Utah, for Appellant-Cross-Appellee Johnson Oil Company, Inc.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

This complex litigation originated on June 28, 1974, when plaintiff, cross-appellant here, Mountain Fuel Supply Company, a Utah corporation (Mountain Fuel) filed its complaint against defendants, appellants here, Reland

Johnson and Johnson Oil Company, Inc., a Utah corporation (Johnson Oil) in the state District Court of Davis County, Utah. All parties are residents of the State of Utah. The cause was removed to the United States District Court for the District of Utah, Northern Division, after Johnson filed an Answer and Counterclaim and petitioned for removal on January 6, 1975. Following extensive pleading and discovery the cause was tried to a jury which, on June 23, 1976, returned a general verdict in favor of Johnson on its counterclaim. It awarded Johnson $65,000 in compensatory damages and $110,000.00 in punitive damages. Upon motion by Mountain Fuel, the court struck the award of punitive damages. Judgment was entered awarding Johnson damages in the amount of $65,000.00. Both parties appeal.

After this appeal was docketed and calendared, this Court, sua sponte, requested that the respective parties brief the question of this Court's subject matter jurisdiction. We assumed that in view of the lack of diversity of citizenship between the parties, this action was one arising under federal law within the meaning of 28 U.S.C.A. § 1311 justifying its removal from state court to federal district court pursuant to 28 U.S.C.A. § 1441. Our concern was whether the appeal falls within the jurisdiction of this Court or the exclusive jurisdiction of the Temporary Emergency Court of Appeals (TECA). We shall focus on the appellate jurisdictional issue which we believe to be dispositive.

The Mountain Fuel complaint filed in the state court and removed to the federal

district court alleges, in summary, that: on July 15, 1970, Mountain Fuel entered into a written agreement with Johnson whereby Mountain Fuel agreed to sell and Johnson agreed to buy all condensate which it owned, controlled or produced from the Dry Piney Field in Sublette County, Wyoming, commencing August 1, 1970 to July 1, 1971, and thereafter until terminated upon thirty-day notice, at the tank truck loading racks of said unit at an amount equal to "the per barrel price posted on date of delivery by Pan American Petroleum Corporation (AMOCO) for Southwestern Wyoming crude oil of forty (40) degrees to forty-four (44) degrees a.p.i. gravity, plus five cents (5) per barrel, which posted price on the date hereof is Three Dollars and Twenty-Eight Cents ($3.28) per barrel of forty-two (42) gallons" [R., Vol. V, p. 9]; that thereafter nugget

crude oil was substituted for condensate by agreement of the parties; on "August 17, 1973, the Cost of Living Council of the United States issued its 'Phase IV' oil regulations, a copy of which is attached and incorporated herein by reference. That on or about December 19, 1973, the Cost of Living Council issued further regulations governing the price ceiling on oil, a copy of which, as published in the Federal Register, is hereto attached and incorporated herein by reference." (Emphasis supplied.) [R., Vol. V, p. 5]; on November 16, 1973, Mountain Fuel notified Johnson by letter that in view of the Phase IV price controls it would, effective December 1, 1973, charge the ceiling price of $4.65 per barrel and that, in addition, under the applicable federal regulations, it would charge the applicable AMOCO field

posted price of $5.83 plus 3 cents or $5.86 per barrel of that referred to in the regulations as "new" or "released old" oil; thereafter Mountain Fuel delivered to Johnson billed at $128,652.57 in accordance with the pricing arrangements established by the federal price ceiling regulations; Johnson has refused to pay the principal sum of $40,585.00; Mountain Fuel prayed for judgment in principal sum of $40,585.50, interest at the rate of 7 percent per annum and costs.

Johnson filed an Answer and Counterclaim in the state court proceeding. The Answer acknowledged receipt of the Mountain Fuel letter of November 16, 1973, setting forth proposed changes under the Federal Energy Office Regulations to which it agreed, but specifically denied that it had agreed to pay any increased price for oil or that Mountain Fuel had in fact any

"new oil" or "released old oil" at its disposal. Certain affirmative defenses were pleaded. In its Counterclaim, Johnson alleged that Mountain Fuel: breached the agreement of July 15, 1970, in violation of the Emergency Petroleum Allocation Act of 1973 and the regulations promulgated thereunder; refused to supply crude oil as provided under the agreement and sold the oil to Allied Chemical Company; and interfered with the business relationship between Johnson and Allied Chemical Company; and interfered with the business relationship between Johnson and Allied Chemical Company, resulting in a violation of the Emergency Petroleum Act of 1973 and the regulations promulgated thereunder. Johnson prayed for $70,000.00 compensatory damages, $5,000.00 as civil penalties under the regulations promulgated pursuant to the Emergency

Petroleum Allocation Act of 1973, costs and other relief. Johnson thereafter filed an Amended Answer and Counterclaim in the state court. In addition to violations charged in derogation of the Emergency Petroleum Allocation Act of 1973 and the regulations promulgated pursuant thereto, Johnson alleged overcharges in violation of the Economic Stabilization Act of 1970, and other causes. The prayer of the Amended Answer and Counterclaim was for dismissal of Mountain Fuel's complaint, award to Johnson of $200,000.00 as damages on its First Cause of Action, together with $600,000.00 as civil penalty provided by the Economic Stabilization Act of 1970, $105,000.00 as damages for the Second Cause of Action, together with $762,500.00 as civil penalty provided by the Economic Stabilization Act of 1970, the sum of $80,000.00 as damages for the

Third Cause of Action, attorneys fees, and costs.

The substantive issues posed by the allegations contained in the pleadings filed by the parties in the state court as of January 5, 1975, when Johnson filed its Petition for Removal to the federal district court included: the applicability of the amounts (prices) Mountain Fuel was entitled to charge Johnson and the sums Johnson owed based on the validity of regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 which purport to alter or affect the initial agreement, the interpretation of the contract-agreement in light of the "applicable" price posted by AMOCO plus 3 cents per barrel, known as the "posted price"; a subsequent offer submitted to Mountain Fuel to purchase the oil at a higher price known as "The Cowboy

Contract Price of April 1, 1973"; the "ceiling price" regulation established by the Cost of Living Council under the Economic Stabilization Act of 1970 (ESA), § 210(a), 12 U.S.C.A. § 1904 Note and the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C.A. § 751, et seq., relating to interpretation and price of "new oil" and "released old oil" at Mountain Fuel's disposal for sale; whether Mountain Fuel's refusal to supply crude oil to Johnson from and after April 1, 1974, was a breach of contract in violation of the EPAA of 1973 and the regulations promulgated thereunder; and whether Mountain Fuel overcharged Johnson for oil alleged to be "new oil" in violation of § 210 of the ESA of 1970.

15 U.S.C.A. § 754(a)(1) of the EPAA of 1973 incorporates by reference §§ 205-

211 of the ESA of 1970 and all regulations promulgated thereunder.

12 U.S.C.A. § 1904 Note (Supp. 1977) of the ESA of 1970 provides in § 211(a):

> The district courts of the United States shall have exclusive jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of Chapter 89 of title 28, United States Code [Chapter 89 of Title 28]. (Emphasis supplied.)

Following removal and prior to commencement of the trial before the jury, Johnson stipulated that it owed Mountain Fuel the sum of $19,629.50. This disposed of the claim on Mountain Fuel's complaint. The case was then tried and it went to the jury on Johnson's counterclaim. The trial court, upon motion, set aside the jury verdict of $110,000.00 for punitive damages in favor of Johnson and against Mountain Fuel. Judgment was then entered on behalf of Johnson representing the verdict award of $65,000.00 compensatory damages, together with interest and costs. In addition, the judgment (a) ordered that Johnson be entitled to receive (from Mountain Fuel) "125 barrels of base production control level crude oil pursuant to and during the existence of the December 1, 1973 EPA (Emergency Petroleum Allocation) Regulation, 10

C.F.R. § 211.64(a), so long as the same is unaltered and in effect and so long as there is no overall shortage of production, and other regulatory and contractual requirements are satisfied by Johnson Oil Company, Inc." [R., Vol. VI, p. 328.] and (b) that Johnson's claims for recovery of treble damages, civil penalties, attorneys fees and costs "under Sections 208(b) and 210(b) of the 1970 Economic Stabilization Act" be denied. [R., Vol. VI, p. 329.]

After the appeal and cross-appeal were docketed and calendared in this Court, we directed, on our own motion, that the parties address a section of their respective briefs to the question whether their appeals are properly before this court rather than before the TECA. This issue is, in our view, dispositive.

Johnson adopted and agreed with the jurisdictional issue presented in Mountain

Fuel's brief. [Brief of Johnson, p. 4.] Thus, both parties are in agreement with the propositions presented under the caption "Jurisdiction" of Mountain Fuel's brief. [Brief of Mountain Fuel, pp. 19-25.] The parties contend that this Court has jurisdiction to hear and adjudicate each of the claims of tbe respective parties in that this is not a case which "arises under" the Allocation Act of 1973, supra. While giving hesitant credence to the proposition that 12 U.S.C. § 1904 Note (§ 211 of the ESA), as incorporated in the EPAA of 1973 does vest exclusive jurisdiction in the TECA as to those matters which "arise under" the subject Acts and regulations, the parties urge that such does not apply in the case at bar because the complaint of Mountain Fuel filed in the state court "did not, in any sense involve itself with or raise substantive

issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder" and that ". . . the Complaint alleges a cause of action sounding solely in breach of contract." [Brief of Mountain Fuel, p. 23.] If this court were to accept the contentions so advanced and the authorities cited and relied upon in the briefs, we would be compelled to hold and conclude that not only is this Court without jurisdiction on appeal but, more astonishingly, that the federal district court was without jurisdiction to hear the matter following removal. The reasons, we believe, are obvious. First, there exists no diversity of citizenship between the parties meeting the jurisdictional requirements of 28 U.S.C.A. § 1332. Accordingly, if the action --as reflected solely by the Mountain Fuel complaint filed in the state court --

did not, as contended by the parties, "in any sense, involve itself with or raise substantive issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder" [R., Vol. V, pp. 4-18.], but simply alleged a cause of action sounding solely in breach of contract (as contended) which did not implicate any applicable federal laws, rules, regulations or orders, then the removal from the Utah state court was improvident and without jurisdictional justification as a matter of law! This position is the more difficult to reason upon when we consider that the crux of the parties' argument is that the test for determining whether an action "arises under" the Constitution, treaties or laws of the United States giving rise to jurisdiction under the "federal question" authority of 28 U.S.C.A. § 1331(a) (no

diversity required) must be determined solely by the presence of well-pleaded allegations appearing from the face of the complaint and that the Mountain Fuel complaint does not invoke any federal laws. If this contention of the parties were to control, we would be compelled to hold that the federal district court lacked subject matter jurisdiction. This would be so simply because, lacking diversity of citizenship between the parties and the existence of a "federal question," only the breach of contract action would remain, to be governed exclusively by the law of Utah. Under such circumstances no cause would exist for removal from the state court to the federal district court.

The parties contend that in determining the existence of the "federal question" jurisdiction under 28 U.S.C.A.

§ 1331(a) justifying removability from a state court to a federal court one must look solely at the plaintiff's complaint rather than to any subsequent pleading or the petition for removal. We agree. This is, of course, a fundamental rule. Barron & Holtzoff, Federal Practice and Procedure, (Wright Ed.) Vol. I, § 102, p. 471; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); Great Northern Railyway Company v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); Arkansas v. Kansas and Texas Coal Co., 183 U.S. 185, 22 S.Ct. 47, 46 L.Ed. 144 (1901); Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975); Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324 (10th Cir. 1974), cert. denied, 419 U.S. 841, 95 S.Ct. 72, 42 L.Ed.2d 69 (1974); Slattery v. Arapahoe

Tribal Council, 453 F.2d 278 (10th Cir. 1971); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971), cert. denied, 405 U.S. 964, 92 S.Ct. 1176, 31 L.Ed.2d 241 (1972); Metropolitan Paving Company v. International Union of Operating Engineers, 439 F.2d 300 (10th Cir. 1971), cert. denied, 404 U.S. 829, 92 S.Ct. 68, 30 L.Ed.2d 58 (1971); Simpson v. State of Utah, 365 F.2d 185 (10th Cir. 1966). The parties argue that the Mountain Fuel complaint alleges a cause of action sounding solely in breach of contract and that "While it is true that Paragraphs 6 and 7 of the Complaint (R. 5) allude to 'Phase IV' oil regulations promulgated by the CLC, such does not change the essence or character of the Complaint. The said regulations are neither attacked nor sought to be enforced. Nowhere on the

face of the Complaint does Mountain Fuel ask for an interpretation or application of the regulations." [Brief of Mountain Fuel, p. 23.] Thus, if we were to adopt, accept and concede this argument of the parties we would surely be compelled to hold that the federal district court lacked subject matter jurisdiction and that the judgment must be vacated. This is so because (again accepting for the purpose of this discussion the contentions advanced by the parties) (a) there is no diversity of citizenship between the parties justifying removal of the cause from state court to federal district court as required pursuant to 28 U.S.C.A. § 1331 and (b) removal is not justified on the basis that a substantial federal question is asserted on the fact of the complaint.

We hold, however, that the Mountain Fuel complaint filed originally in the

Utah state court does, on its face, assert a substantial federal question under the laws and regulations of the United States independent of allegations or affirmative relief asserted in Johnsons' Answer and Counterclaim or Petition for Removal. The general rule is that if a case arising (in fact) under the laws of the United States is filed in state court but is non-removable to a federal district court for want of assertion of the federal question on the face of the complaint, jurisdiction can attach only by the voluntary amendment of the plaintiff's pleadings. Great Northern Railway Company v. Alexander, supra. Thus, if we were to honor the contention of the parties relative to "want" of a federal question on the face of Mountain Fuel's complaint, it was the duty of the federal district court to remand the case to the state court when it

became manifest upon the face of the complaint or the petition for removal that the case has been improperly removed to the federal court. Cameron v. Hodges, 127 U.S. 332, 8 S.Ct. 1154, 32 L.Ed. 132 (1888).

A case "arises" under the laws of the United States if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment. Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912). Thus, if the action is not expressly authorized by federal law, does not require the construction of a federal statute and/or regulation and is not required by some distinctive policy of a federal statute to be determined by application of federal legal principles, it does not arise under

the laws of the United States for federal question jurisdiction. Lindy v. Lynn, 501 F.2d 1367 (3rd Cir. 1974.)

We need not again detail the Mountain Fuel complaint in relation to its invocation of a "federal question" on its face. We hold that it does invoke a substantial federal question, contrary to the contention of the parties. The very predicate for the damage claim of Mountain Fuel in the breach of contract sense is that Mountain Fuel is entitled to a sum in excess of the originally agreed contract price for crude oil based upon the "Phase IV" oil regulations issued by the Cost of Living Council on August 17, 1973, (promulgated pursuant to the ESA of 1970, supra) which were attached to said complaint "and incorporated" by reference therein, coupled with Mountain Fuel's allegations that the "ceiling price" or

"posted price" under the applicable federal regulations which it charged Johnson for "old," "released," or "new" oil justified the $5.86 per barrel charge. The federal regulations above referred to are those promulgated under the EPAA of 1973, supra. That Act incorporated by reference the ESA of 1970. Thus, on its face, the Mountain Fuel complaint did in fact invoke a substantial federal question involving the construction, applicability and effect of the aforesaid federal acts and governing regulations relating to the monetary awards claimed.

The general rule is that a motion to dismiss an action for lack of subject matter jurisdiction will be denied even though the allegation of jurisdiction is insufficient or entirely lacking if there are facts pleaded in the complaint from which jurisdiction may be inferred in

essence and effect. Wright and Miller, Federal Practice and Procedure: Civil § 1350, p. 550. A complaint is to be construed broadly and liberally as to do substantial justice. Mitchell v. Parham, 357 F.2d 723 (10th Cir. 1966); 12 ALR 2d Anno., pp. 1-74, Federal Courts' Jurisdiction. As heretofore noted, the Mountain Fuel complaint set forth a copy of the "Condensate Agreement" of July 15, 1970, by reference "attached hereto, referred to hereby and incorporated herein." [R., Vol. V., p. 4.] In addition, the complaint set forth a copy of the "Phase IV oil regulations" promulgated by the Cost of Living Council under the Economic Stabilization Program and the Cost of Living Council's regulations governing the "price ceiling on oil" as published in the Federal Register which were "hereto attached and

incorporated herein by reference." [R., Vol. V, p. 5.] Finally, attached to the complaint was a Mountain Fuel letter of November 16, 1973, to Johnson Oil notifying that future pricing arrangements were subject to the "federal price ceiling regulations." [R., Vol. V, p. 5.] Thus, it is clear that while the relationship between Mountain Fuel and Johnson Oil was predicated upon the Condensate Agreement of July 15, 1970, that Mountain Fuel's claims, as discerned from the face of its complaint, is that because of the intervening federal laws and regulations there is a substantial federal question involved fn the controversy. Mountain Fuel alleges that because of the federal laws and regulation it was entitled to more monies for the sale of oil to Johnson Oil than the prices set forth in the written agreement.

We first observe that any contention that a substantial federal question was not set forth "on the face" of the Mountain Fuel complaint is without merit. Fed. Rules Civ. Proc. rule 10(c), 28 U.S.C.A. provides that "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Wright & Miller, Federal Practice and Procedure: Civil § 1327. In this case, the Mountain Fuel complaint, originating by specific written contract, finds its remedial prayer anchored to an interpretation and applicability of federal laws and regulations governing the price or prices it may legally charge Johnson Oil under and by reason of the aforesaid federal laws and regulations. Thus, the federal claim or claims asserted by Mountain Fuel on the face of its complaint clearly present a substantial

federal question or questions arising under the laws of the United States.

Even though a complaint involves a state claim still, as a matter of judicial economy the federal court has power to entertain the pendent claim if the federal claim arises "under the Constitution, the Laws of the United States and the treaties made" and the relationship between the state claim and the federal claim permits the conclusion that the entire action before the court compromises but one case. The federal claim must, of course, have sufficient substance to confer subject matter jurisdiction on the federal court. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction, § 3567. The criteria is met here.

We hold that it is not necessary to rely exclusively on the Mountain Fuel complaint in order to justify removal on the "federal question" basis. The amended Johnson Answer and Counterclaim filed in the state court, coupled with its Petition for Removal, "fits" the four corners of 12 U.S.C.A. § 1904 Note (Supp. 1977) of the ESA of 1970, § 211(a), supra, in that removal jurisdiction is specially recognized if any issue raised by way of defense challenges the validity of agency action under the two subject federal acts. Johnson's Amended Answer and Counterclaim challenged the validity of certain regulations promulgated pursuant to the EPAA of 1973 which Johnson alleged to directly affect its cause, i.e., those relating to "old oil" and "new oil." These grounds were specifically relied on

in Johnson's Petition for Removal. [R., Vol. V, pp. 1-3.]

The parties, per briefs, rely upon the identical jurisdictional arguments heretofore discussed in support of their contention that this Court, rather than the TECA "has a firm hand on subject matter jurisdiction on each and all of these issues, including 'posted price' and 'allocation' of Dry Piney crude oil, on appeal herein, whether those issues are raised under the cross-appeal of Mountain Fuel or the main appeal of Johnson." [Brief of Mountain Fuel, p. 25.] We disagree.

The TECA was created by Congress in the ESA of 1970, 12 U.S.C.A. § 1904. Note § 211(b)(2) of that Act provides, inter alia:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of

all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder . . . . (Emphasis supplied.)

15 U.S.C.A. § 754(a)(1) of the EPAA of 1973 incorporates by reference § 205-211 of the ESA of 1970, as amended, in effect November 27, 1973, which ". . . shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issues, or such action had been taken under the Economic Stabilization Act of 1970; . . . ."

In Bray v. United States, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975) the Supreme Court said:

As part of the Economic Stabilization Act Amendments of 1971,

Congress created the TECA (Temporary Emergency Court of Appeals) and vested it with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." § 211(b)(2), 85 Stat. 749. This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision." S. Rep. No. 92-507, p. 10 (1971). The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. (Emphasis supplied.)

423 U.S., at p. 74, 96 S.Ct. at P. 309.

We have previously noted that the issues tried in this case were those framed by the Johnson Counterclaim. The allegations set forth in that Counterclaim invoked and implicated United States laws under the ESA of 1970, 12 U.S.C.A. 1904

Note (Supp. 1977); the EPAA of 1973, 15 U.S.C.A. §§ 751, et seq., and the implementing regulations duly promulgated thereunder. 6 CFR § 150.353 (1974); 10 CFR § 211.63 (a) (1977). These regulations spell out the two-tier pricing system established in 1973 which provides that "old oil" may may not be sold above the lower tier ceiling price, 10 CFR § 212.72 (1977) and that "new oil" may not be sold above the upper tier ceiling price, 10 CFR § 212.74 (1977). Allegations against Mountain Fuel involve its alleged disregard of the government "freeze order," making "illegal" charges above the "ceiling price," and requiring Johnson to purchase "old," "released" and "new" oil at illegal prices contrary to government regulations. Furthermore, Johnson directly challenged the validity of certain regulations promulgated

pursuant to the EPAA of 1973 as interpreted by officials of the Federal Energy Administration, which agency action allegedly destroyed the "competitive viability of [Johnson] . . . and are therefore invalid." [R., Vol, V., p. 2.] Seemingly strict contract law allegations advanced by Johnson against Mountain Fuel involve disregard of and ultimate wrongful termination of the written contract and wrongful and intentional interference with Johnson's contractual relationship with Alllied Chemical Company. That these "contract law" allegations are not separable from the federal acts and regulations previously discussed herein is best evidenced by these recitals in Johnson's brief:

> . . . on April 9, 1974, it [Mountain Fuel] ceased selling crude oil to Johnson. Mountain Fuel has since then treated the termination matter as though it is totally governed by general

> contract law. This is clearly not the case. Any right to terminate the sales of crude oil has to be found within the language of the price and relationship freeze imposed by the federal government.
>
> [Brief of Johnson, pp. 53, 54.]

We agree.

We hold that this court is without jurisdiction to entertain this appeal. In our view, exclusive jurisdiction vests in the TECA by virtue of 28 U.S.C.A. § 1331 (Supp. 1977); 15 U.S.C.A. § 754(a)(1), which incorporates § 211 of the ESA of 1970, 12 U.S.C.A. § 1904 Note (Supp. 1977). See also: Mary's Hospital of East St. Louis, Inc. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974); Exxon Corporation v. Federal Energy Administration, 516 F.2d 1397 (Temporary Emergency Court of Appeals, 1975); Associated General Contractors, Oklahoma Division v. Laborers International Union, Loc. 612, 489 F.2d

749 (Temporary Emergency Court of Appeals, 1973).

Our holding is buttressed by Mountain Fuel's Answering Brief to the appeal of Johnson and the Reply Brief in Mountain Fuel's Cross-appeal, to-wit:

> From the outset of appellate proceedings before this Court, it was clear that the issues under the JOHNSON appeal and the MOUNTAIN FUEL Cross-appeal would involve pricing concepts and regulations that could fall within the jurisdiction of the Temporary Emergency Court of Appeals (TECA). In point of fact, the opening Brief of MOUNTAIN FUEL poses the query of whether TECA jurisdiction is present in this case with respect to the interpretation of "posted price." That query is also at large with respect to the claim made by JOHNSON in his appeal on treble damages, attorneys' fees, and "civil penalties" under the Economic Stabilization Act of 1970.
>
> [Brief of Mountain Fuel, p. 28.]

WE DISMISS for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	:	
Plaintiff and Counter-Defendant,	:	FINAL JUDGMENT AND ORDER ON PARTICULAR ISSUES
vs.	:	AND JUDGMENT ON VERDICT OF JURY
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	:	
Defendants and Counter-Plaintiffs.	:	

The above-referenced case having come on for trial on all issues raised by the Complaint of Plaintiff and Counterclaim of the Defendant before the Honorable WILLIAM G. JUERGENS, Senior United States District Judge sitting by designation, both parties having been represented by their counsel, respectively, and certain issues of fact having been presented to and tried before

the Court sitting with a jury and other questions of fact and law having been reserved to and determined by this Court;

And the Court being now fully advised as to each and all of the issues of law and fact anywise appertaining in the premises and said issues having been otherwise fully resolved, and for good cause shown pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Final Judgment and Order as to all matters of law and fact is herewith entered in the action, as follows, to-wit:

I.

Based upon the Stipulation of the defendant entered herein at the outset of trial on the 21st day of June, 1976 as to the Complaint of Plaintiff, Judgment be and the same is hereby entered in favor of the Plaintiff, MOUNTAIN FUEL SUPPLY COMPANY and against the Defendant JOHNSON

OIL COMPANY in the sum and amount of $19,628.50, together with pre-judgment interest of $2,533.30, or a total of $22,161.80 together with interest thereon as by law provided from the date of the entry of this Judgment until the same is paid and satisifed.

II.

That based upon the verdict of the jury returned in open Court on the 23rd day of June, 1976, relative to the Counterclaim of JOHNSON OIL COMPANY, INC., Judgment be and the same is hereby entered in favor of the Counterclaimant, JOHNSON OIL COMPANY, INC. and against the Counter-Defendant, MOUNTAIN FUEL SUPPLY COMPANY in the sum of $65,000.00 compensatory damages, together with interest thereon from the date of this Judgment until the same is paid and satisfied, as by law provided. The Counterclaimant JOHNSON OIL

COMPANY, INC. shall also have its taxable costs in the matter.

III.

With respect to the claim of JOHNSON OIL COMPANY for punitive damages against MOUNTAIN FUEL SUPPLY COMPANY and the jury verdict of $110,000.00 returned on June 23, 1976, the Motion of MOUNTAIN FUEL for a Directed Verdict against JOHNSON, was, pursuant to the Interlocutory Order of August 2, 1976, granted, and Judgment be and the same is hereby entered in favor of MOUNTAIN FUEL SUPPLY COMPANY and against JOHNSON OIL COMPANY, INC. on said punitive damage Count.

IV.

That pursuant to the Interlocutory Order of the Court under date of May 26, 1976, it is ordered that JOHNSON OIL COMPANY is entitled to receive 125 barrels of base production control level crude oil

pursuant to and during the existence of the December 1, 1973 EPA Regulation, 10 C.F.R. § 211.64(a), so long as the same is unaltered and in effect and so long as there is no overall shortage of production, and other regulatory and contractual requirements are satisfied by JOHNSON OIL CONPANY, INC.

V.

That with respect to the claims of JOHNSON OIL COMPANY, INC. for the recovery of treble damages, civil penalties, attorney's fees and costs under Sections 208(b) and 210(b) of the 1970 Economic Stabilization Act, judgment be and the same is hereby entered in favor of MOUNTAIN FUEL SUPPLY COMPANY and against JOHNSON OIL COMPANY, INC.

Dated this ____ day of March, 1977.

BY ORDER OF THE COURT

WILLIAM G. JUERGENS
Senior United States
District Judge

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed in the lawfirm of WATKISS & CAMPBELL, 315 East 2nd South, Salt Lake City, Utah and that in said capacity and pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true copy of the attached FINAL JUDGMENT AND ORDER ON PARTICULAR ISSUES AND JUDGMENT ON VERDICT OF JURY, was caused to be served upon:

DAN S. BUSHNELL, ESQ.
JOSEPH C. RUST, ESQ.
336 South Third East
Salt Lake City, Utah 84111

by depositing a properly addressed envelope containing the same in the U.S. Mails, postage prepaid thereon this 2nd day of March, 1977.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff,	)	ORDER DETERMINING QUESTIONS OF LAW
vs.	)	NC 75-3
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	)	
Defendants.	)	

On December 11, 1975, the plaintiff in the above-entitled case filed a motion for summary judgment. On December 31, 1975, the defendants filed a motion requesting a ruling on matters of law. Both sides have filed extensive materials and oral arguments were heard on several occasions. The court has carefully considered all of the arguments and deems itself to be well advised on the merits. Since the parties are in basic agreement

concerning the underlying facts, the court is prepared to rule upon the issues of law.

One of the major issues presented by the above motions was ruled upon at a hearing on January 23, 1976. At that time, the court ruled that the "Cowboy" contract price was not a proper "posted price" under the Cost of Living Council [CLC] freeze regulations. The court also stated that the $.35 per barrel increase over the May 15, 1973, "freeze" price allowed by the CLC in August of 1973 and the December 19, 1973, additional increase in the price of "old" oil were properly chargeable to Johnson Oil after those dates.

Counsel have agreed to have their motions passed upon by having the court decide several issues as a matter of law.

On January 21, 1976, counsel signed a stipulation stating that the issues were:

> 1. Whether the plaintiff's procedure of allocating "new or released" and "exempt" oil prices among all Dry Piney crude oil purchasers violated either the Federal law and regulations or the terms of the contract between the parties.
>
> 2. Whether the defendants' refusal to pay the "new or released" oil prices and as weighted with "non-exempt" oil prices and as charged equally to all Dry Piney customers, justified plaintiffs termination of sales to defendants.
>
> 3. [Dealt with the "Cowboy contract price" issue which was subsequently decided.]

The two main issues still before the court can be more easily treated by breaking them down.

Amoco Plus $.03

Since the adverse ruling on the "Cowboy" price, the plaintiff has argued that the contract price that the plaintiff had with its Dry Piney field purchasers is the proper May 15, 1973, posted freeze price. That price is "Amoco posting plus $.03" per barrel. The defendants basically contend that the plaintiff abandoned that price when it attempted to charge the illegal "Cowboy" price and that the Amoco plus $.03 contract price suffers from the same infirmities as the rejected "Cowboy" price.

In September of 1973, the CLC defined "posted price" as "a public offer to buy a specific grade of petroleum in a specific geographic area at a specified price." On December 6, 1973, the CLC published a more complete, specific definition:

> "Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field.

38 F.R. 3577; 10 C.F.R. 212.31 (1975). The latter definition is the one that must be applied by the court.

The contracts with the plaintiff called for a $.03 premium over the Amoco posted price because of the superior quality of the plaintiff's oil. It appears to the court that it would be inequitable to freeze the plaintiff's price at the same level as the price for oil of a lower quality. It appears that the plaintiff's oil was worth "Amoco plus $.03" on May 15, 1975, and that should be the posted freeze price for the

plaintiff's "old" oil if it meets the requirements of the above CLC definition:

1. Written statement of crude oil prices,
2. Circulated publicly among sellers and buyers,
3. In accordance with historic practices, and
4. Generally known by buyers and sellers in the field.

It appears that the "Amoco plus $.03" contract price was generally known by buyers and sellers in the Dry Piney field. The plaintiff has more difficulty in showing that a written statement of that price was circulated publicly among sellers and buyers. The fact that several of the buyers had written contracts that contained "Amoco plus $.03" as the price

does not seem to meet the CLC requirements. It appears, however, that the monthly invoices sent to companies that dealt with the plaintiff, which stated the price term, do qualify as circulated written statements. It is true that each entity did not see the same invoice but the determinative fact is that all of the buyers and sellers received invoices and each invoice contained the same price term (except for the 600 barrels per day contract with Cowboy Oil). The practice of sending invoices with the Amoco plus $.03 price term dates back to 1970 and seems to be of long enough duration to qualify as a "historic practice."

Freeze Regulation

The most difficult problem faced by the court relates to the application of the December 1, 1973, freeze regulation.

The freeze order bas been upheld but there is little judicial precedent to guide this court in interpreting the regulation. Condor Operating Co. v. Sawhill, 514 F.2d 351 (Emer. Ct. App. 1975), cert. denied, 421 U.S. 976 (1975); see Exxon Corp. v. Federal Energy Office, 394 F. Supp. 662 (D.C. 1974). The plaintiff contends that the regulation guaranteed Johnson Oil's right to take a share of the total production and that the regulation was purely an allocation and not a price regulation. The defendants contend that the December 1 freeze order froze types as well as amounts of oil and does affect the price that can be charged. It appears that Johnson Oil was receiving "base production control level" oil on December 1, 1973, the date as of which the relationships were frozen.

The regulation in question was promulgated in January of 1974 and provides:

> All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program . . . .

10 C.F.R. § 211.63(a) (1975) [formerly § 211.64(a)]. An examination of the above wording does not indicate which of the proposed interpretations is proper. The regulation further provides:

> (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser.

39 F.R. 3908 (Jan. 30, 1974). The above portion of the regulation was amended in May of 1974 so that it applied only to "new" and "released" oil. During the period that concerns the court, however, it referred generally to crude oil. The defendants claim that the above provision gives Johnson Oil a first right of refusal on "new" oil but does not require Johnson to take "new" oil since it was receiving no "new" oil on December 1, 1973. If the defendants were receiving no "new" oil, as they contend, they had no right of refusal with respect to the plaintiff's "new" oil output:

> (b) New crude petroleum may be sold to any person. Once the sale is made, the seller of such new crude petroleum shall continue to sell to that purchaser subject to the provisions of paragraph (a)(1), (2), and (3) of this section.

Id. To have a right of refusal, the defendants would have to be "present purchasers" of that oil on December 1, 1973, which they adamantly maintain they were not. Whoever was purchasing the plaintiff's new oil on December 1, 1973, was the person who had the right of refusal.

The defendants initially argued that the "special release rule," found in 39 F.R. 1924 [212.74(b)] (January 15, 1974); 6 C.F.R. 150.354(3) (1974), that allowed "base production control level" oil to be removed from price controls as "released" oil exceeded the limits of legislative delegation of authority. That issue has already been decided. In Consumers Union of United States, Inc. v. Sawhill, 512 F.2d 1112 (Emer. Ct. App. 1975), the Federal Energy Administration's [FEA]

regulation setting a ceiling on prices for "old" crude and "released" crude through the 212.74(b) formula was upheld and the regulation that permitted "new" crude to be sold at the free market price was held to be invalid. A rehearing en blanc was granted and a closely divided court partially reversed itself by holding that the regulatory scheme that allowed "released" oil and "new" oil to be sold at the free market price was valid. Consumers Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (Emer. Ct. App. 1975).

The defendants' initial argument was that they were entitled to a continued supply of crude oil at the December 1, 1973, level and at the frozen "old" oil price. The defendants have modified that contention and now laternatively argue that the price should be determined by

applying the pricing formula found in 39 F.R. 1924 [212.74(b)] (January 15, 1974).[1] The formula allows "base production control level" crude oil to be sold at a price higher than the freeze

1. (b) Released crude. Notwithstanding paragraph (a) of this section, if this section, if during a particular month new crude petroleum which could be sold at other then the ceiling price pursuant to paragraph (a) of this section is produced from a property, the entire base production control level crude petroleum for that month may be sold at a price which exceeds the ceiling price: Provided, That the maximun price charged per barrel of that base production control level crude petroleum does not exceed the lesser of (1) the current free market price for the particular quality or grade of crude petroleum or (2) the price derived pursuant to the following:

$$P_{max} = P_c + \left[\left(\frac{C_{pr}}{C_{bpcl}} - 1\right)\right]\left(P_m - P_c\right)$$

Where:

P_{max} = Maximum price that may be charged for the crude petroleum (other new crude) purchased from the property (dollars per barrel);

P_c = Ceiling price of the crude petroleum (dollars per barrel);

price for "old" oil. The formula prices "old" oil at the frozen maximum price and includes a proportionate share of "released" oil at the free market price. The court feels that this argument has substantial merit.

The plaintiff has referred the court to an FEA ruling that partially explains 212.74:

> The formula of 212.74(b) was intended to spread the increased price of this amount of crude oil equivalent to the amount of "new" oil, which is permitted to be sold at free market prices, across the entire volume of base production control level crude oil sold during the month. It

(1. Cont.)

C_{bpcl} = Base production control level for property (barrels);

C_{pr} = Total amount of crude petroleum produced from the property during the month (barrels); and

P_{m} = Current free market price of the particular quality and grade of of crude petroleum (dollars per barrel).

> was not intended to permit all base production control level crude oil to be sold at free market prices.

FEA Ruling 1974-11, 10 C.F.R. 269-70 (1975). That ruling does not appear to directly apply to the case before this court because the hypothesis upon which it was based did not involve a December 1, 1973, purchaser but, rather, involved a new purchaser who desired to purchase all of the output, including "old", "new", and "released" oil. Furthermore, the above quoted passage does not necessarily contradict this court's view of the regulations. The ruling states that an "amount of crude oil equivalent to the amount of 'new' oil" will be sold at the free market price and spread across the volume of "base production control level crude oil." The formula does not include "new" oil. It does, however, include

"released" oil in an amount "equivalent to the amount of 'new' oil." It appears that the ruling was referring to "base production control level" oil which is composed of "old" and "released" oil. The statement in 10 C.F.R. 211.64(b) that new crude petroleum could be sold to anyone and the purchaser would not obtain a right of refusal until he actually purchased "new" oil adds additional weight to the court's interpretation. For practical purposes, the amount of "released" oil from a given field is equal to the amount of "new" oil and that appears to be the amount that the formula spreads over the total base production at free market prices.

The formula pricing provision was deleted from the regulations after the plaintiff terminated Johnson Oil. The fact remains, however, that this court

must interpret the regulations as they existed during the early months of 1974. As such, the court's decision may have absolutely no relationship to the regulations as they currently exist.

One of the main purposes of the "released oil" regulation was to increase domestic oil production. That purpose could be partially defeated by an order that the plaintiff must sell Johnson Oil a specified quantity of oil per month at the frozen price regardless of the available "old" supply. The "December 1" regulation freezes relationships to protect small refiners such as Johnson Oil. The two tier pricing regulations and the "December 1" regulation should be construed in such a way as to fulfill the purposes of each without harming the goals of the other regulations. Considering all of the regulations together, it appears that the

price regulations and the quantity or relationship regulations do work together. Johnson Oil was receiving no new oil on December 1, 1973. As such, from that point on, while the "December 1" regulation is in operation and not changed by other regulations, Johnson Oil has a right to receive 125 barrels of "base production control level" crude oil per day from the plaintiff so long as there is no overall shortage and all other requirements are met. It appears that the "formula" price was the proper price while the formula was in existence. The court does not comment on what the price should be for oil purchased today under the changed regulations. In its research, the court has noticed that in several particulars the regulations have changed substantially since the early months of 1974. For example, the "entitlements program" was

initiated after the plaintiff terminated Johnson Oil. 10 C.F.R. 211.67 (1975). Changes such as that could substantially affect the court's interpretation of the "December 1" regulation for prospective application. See Pasco, Inc. v. Federal Energy Administration, 525 F.2d 1391 (Em. Ct. App. 1975). Those changes were not, however, argued or briefed for the court's current deliberations.

Wrongful Termination of Contract

Since both parties were working with new regulations and had little information to guide them, except for the issue on punitive damages, the court believes that they were acting in good faith concerning any errors in interpretation they may have made. Neither side was completely correct in its position. The court will not now specify any relief but simply notes that it believes the law requires Mountain Fuel

and Johnson Oil to be restored to an equitable position under their contract.

Punitive Damages

The court feels under the present factual posture defendants' claim for punitive damages may not be eliminated by a motion for summary judgment.

Condensate

In its original motion for summary judgment, the plaintiff raised an issue concerning condensate taken by Johnson Oil. The court believes there is reason to support the claim that any condensate taken from areas where there was no "old" production could be charged at the contract price of "Amoco posting plus $.05." Since the original arguments the parties have ignored the issue.

Consequently, the court will not now finally rule upon it.

IT IS HEREBY ORDERED that the proper "posted price" for crude oil for the Dry Piney field on May 15, 1973, is "Amoco posting plus $.03."

IT IS FURTHER ORDERED that Johnson Oil is entitled to receive 125 barrels of base production control level crude oil per day from the plaintiff while the "December 1" regulation is unaltered and in effect and so long as there is no overall shortage of production and other regulatory and contractual requirements are met by Johnson Oil. The price for the oil actually received by Johnson Oil during 1974 should be the previously discussed "formula" price.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment will not be granted on the defendants' counterclaim for punitive damages.

Dated this 26th day of May, 1976.

ALDON J. ANDERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff,	)	ORDER SUPPLEMENTING ORDER OF MAY 28, 1976
vs.	)	NC 75-3
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	)	
Defendants.	)	

On May 26, 1976, the court signed an "Order Determining Questions of Law" and filed the order on May 28, 1976. Since that time the court has been informed that counsel interpret the order differently concerning the issue of whether the plaintiff wrongfully terminated the contract with Johnson Oil. This order is being entered to resolve that dispute.

The plaintiff wrongfully established the "Cowboy" price as the "posted price" and demanded that Johnson Oil pay for "new" as well as "old" and "released" oil. The defendants wrongfully refused to pay a price above the frozen "old oil" price for any of the oil they received in 1974 and refused to pay the $1.00 per barrel authorized price increase in December of 1973. On page 9 of the May 28, 1976, order the court discussed the wrongful termination of contract issue. The court pointed out:

> Neither side was completely correct in its position. The court will not now specify any relief but simply notes that it believes that the law requires Mountain Fuel and Johnson Oil to be restored to an equitable position under their contract.

It was the intention of the court to reserve the issue of wrongful termination of contract for determination at the trial. The court did not specify any

relief for the period during which Johnson Oil received no oil or condensate from the plaintiff. The award of such relief, if any, should be specified after the wrongful termination issue is decided at the trial.

IT IS HEREBY ORDERED that the wrongful termination of contract issue will be decided at the trial.

DATED this 2nd day of June, 1976.

ALDON J. ANDERSON
United States District Judge

AFFIDAVIT OF SERVICE

I, Kathy Pickett, depose and say that I am a secretary in the office of Dan S. Bushnell and Joseph C. Rust, and that on March 17, 1979, pursuant to Rule 33, Rule of Supreme Court, I served three copies by mail of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, on each of the parties required to be served herein, as follows:

Robert S. Campbell
Duane R. Smith
Watkiss & Campbell
310 South Main #1200
Salt Lake City, Utah 84101

Kathy Pickett